

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.)	
)	
Plaintiffs,)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	

**DEFENDANTS' COUNTER-NOTICE ON "STATE OF OKLAHOMA'S NOTICE OF
FILING OF DOCUMENT" [DKT #2108]**

On May 20, 2009, Plaintiffs filed a "Notice of Filing of Document" (hereafter the "Notice"). Dkt. #2108. The Notice attaches a document that purports to be an agreement between the Cherokee Nation and the State of Oklahoma (hereafter the "Purported Agreement"). The Notice asserts that the Purported Agreement "relates to issues raised in 'Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on a Lack of Standing [DKT #1788 & #1790].'" *Id.* at 1. The Notice thereby urges the Court to consider the provisions of the Purported Agreement in analyzing the legal issues raised in Defendants' Motion to Dismiss.

Accordingly, Plaintiffs' Notice is the equivalent of a sur-reply. *Southern Star Central Gas Pipeline, Inc. v. Greuel*, 2009 U.S. Dist. LEXIS 36677, at *14, n.4 (D. Kan. April 30, 2009) ("[O]nce movant has filed its reply brief, there is no provision for the filing of any other papers, whether they are called a 'supplement,' sur-reply, further response or something else."); *E.T.I. Euro Telecom Int'l N.V. v. Republic of Bolivia*, 2008 U.S. Dist. LEXIS 67217, at *1-2, n.2 (S.D.N.Y. Sept. 4, 2008). However, the Notice does not fully explain to the Court the legal implications of the various provisions contained in the Purported Agreement. A full

understanding of those issues is critical to the Court's evaluation of the Motion to Dismiss. *See, e.g., Norwood-Thomas v. City of Milwaukee*, 2008 U.S. Dist. LEXIS 104642, *2-3 (E.D. Wis. Dec. 18, 2008) (emphasizing the benefit of "full briefing" before "ruling definitively on the matter"); *Leaf Funding, Inc. v. Donahue*, 2008 U.S. Dist. LEXIS 45208 *4-5 (S.D. Ohio June 6, 2008) (noting the "benefit of full briefing on issues that the parties may have never fully contemplated").

For example, the Purported Agreement concedes that Defendants' arguments in the Motion to Dismiss are correct, admitting that "the Cherokee Nation has substantial interests in the lands, water and other natural resources located within the Illinois River Watershed." Purported Agreement at 1. As explained in Defendants' Motion to Dismiss, the fact that the Nation possesses this substantial interest triggers the requirement that it be joined under Rule 19 if feasible. *See* Motion to Dismiss, Dkt. #1788 at 14-23.

However, the Purported Agreement attempts to avoid a Rule 19 analysis by claiming that the State and the Cherokee Nation have "assigned" the Nation's rights in this case. Plaintiffs apparently suggest that the Court need not decide whether the Nation or the State is the proper plaintiff because the parties have agreed among themselves that the State has standing. *See* Purported Agreement at 1-3. But this attempt to achieve standing by contract has substantial legal problems that have not been addressed for the benefit of the Court. For example:

First, Oklahoma law explicitly prescribes a process that the State must follow in entering into agreements with Indian Tribes. 74 Okla. Stat. § 1221 provides:

C. 1. The Governor, or named designee, is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian Tribal Governments within this state to address issues of mutual interest. Except as otherwise provided by this subsection, such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations.

2. If the cooperative agreements specified and authorized by paragraph 1 of this subsection involve trust responsibilities, approval by the Secretary of the Interior or designee shall be required.

3. Any cooperative agreement specified and authorized by paragraph 1 of this subsection *involving the surface water and/or groundwater resources of this state* or which in whole or in part apportions surface and/or groundwater ownership shall become effective only upon the consent of the Oklahoma Legislature authorizing such cooperative agreement

Id. (emphasis added). Accordingly, under Oklahoma law, such agreements must be negotiated and approved by the Governor and do not become effective until approved by the Joint Committee on State-Tribal Relations. *Id.* For cases (such as this) involving trust responsibilities over surface water and groundwater, an agreement with a Tribe does not become effective until approved by the Secretary of the Interior and a vote of the state Legislature. *See id.* The Attorney General alone is not empowered either to give away or augment the rights and privileges of the State of Oklahoma. That power is reserved to the Oklahoma Legislature and Governor. The Purported Agreement recognizes that the parties signing the agreement must have valid authority. *See* Purported Agreement at p. 1 and ¶¶ 5, 7. However, none of those requirements were followed, making the Purported Agreement invalid.¹ This issue has not been briefed for the Court.

Second, even if the Purported Agreement complied with Oklahoma's procedural requirements on agreements with Indian Tribes, it appears that Oklahoma's substantive law forbids assignment of the claims raised in Plaintiffs' Second Amended Complaint. *See, e.g.* 12 Okla. Stat. § 2017(D) ("The assignment of claims not arising out of contract is prohibited.")

¹ There may be similar substantive and procedural issues with regard to federal and tribal restrictions on the transfer of a tribe's rights. The Cherokee Nation and federal law protect tribal interests by restricting the manner in which such rights may be transferred and prohibiting certain transfers. To aid the Court, Defendants will research these issues and set forth the relevant authorities in the forthcoming brief in response to Plaintiffs' Notice.

(formerly 12 Okla. Stat. § 221 (“Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article but this section shall *not be deemed to authorize the assignment of a thing in action, not arising out of contract.*” (emphasis added))); *Aetna Cas. & Sur. Co. v. Associates Transports*, 512 P.2d 137, 140 (Okla. 1973) (“We have held the emphasized portion of § 221 prohibits assignment of a cause of action arising out of a pure tort.”) *Rose Group, L.L.C. v. Miller*, 64 P.3d 573, 575 (Okla. Ct. App. 2003) (“Section 2017(D) prohibits the assignment of claims not arising from contract. This section embodies the common law rule that a chose in action arising out of a pure tort is not assignable.” (citing *Kansas City M. & O. Ry. Co. v. Shutt*, 104 P. 51, 53 (Okla. 1909)). *Dippel v. Hunt*, 517 P.2d 444 (Okla. App. 1973) (“Shortly after Oklahoma became a state its supreme court ... [recognized] the common law prohibition against the assignment of a tort action.... This prohibition obtains unless otherwise provided by statute.”). This issue has not been briefed for the Court.

Third, the Purported Agreement recognizes that, even if the Agreement were validly executed and not barred by Oklahoma and federal law, it still may be necessary for the Court to decide the Motion to Dismiss. *See* Purported Agreement ¶¶ 4, 9, 10 (reserving the Nation’s sovereign immunity for Rule 19 and stating that the Purported Agreement’s provisions are invalid if the ownership of natural resources remains before the Court). This reservation of rights recognizes that it may not be possible to structure an agreement whereby two parties agree that one of them lacks standing, but attempts to avoid deciding which of them is the proper plaintiff. *Id.* p. 1 (agreeing that “the State has sufficient interests ... to prosecute the claims asserted” in this case). It also may not be possible for one CERCLA trustee to select another party to serve as the trustee. Similarly, the identity of the proper plaintiff may be essential to deciding some of Plaintiffs’ claims, such as the trespass claim which requires the plaintiff to

have exclusive possessory ownership of the property in question. *See Defendants' Joint Motion for Summary Judgment on Counts 6 & 10 of the Second Amended Complaint*, Dkt. # 2055, at 8-13. These issues have not been briefed for the Court.

Finally, it may not be possible for a party to retroactively obtain standing for a federal lawsuit, as the Purported Agreement attempts. *See Purported Agreement* ¶ 8. Standing (and thus federal jurisdiction) is determined at the time the action is filed. Although a party must maintain standing throughout the litigation, it may not create standing later and apply it retroactively. Thus, this eleventh hour agreement may not repair the standing defect noted in Defendants' Motion to Dismiss. This issue has not been briefed for the Court.

This counter-notice does not brief these significant legal issues, which were only recently raised by Plaintiffs' filing of the Notice. Defendants file this counter-notice only to respectfully alert the Court that Plaintiffs' Notice raises these and other significant legal issues and that Defendants intend to file a brief that assists the Court by fully addressing the issues raised by the Notice.

Respectfully submitted,

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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